SUPREME COURT, U.S.
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No. 94-1079

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

UNITED TECHNOLOGIES CORPORATION and
BASF CORPORATION,

*Petitioners,*

vs.

BROWNING-FERRIS INDUSTRIES, INC., CARLETON WOOLEN MILLS, INC., CENTRAL MAINE POWER COMPANY, COMMUNITY SERVICE TELEPHONE COMPANY and PROGRESSIVE IRON WORKS, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

## BRIEF IN OPPOSITION OF RESPONDENT CARLETON WOOLEN MILLS, INC.

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## COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether Petitioners' action to recover a share of the response costs incurred under a consent decree that resolved a common liability to the state and federal governments was an "action for contribution" and, thus, barred by the statute of limitations governing actions for contribution under § 113(g)(3)(B) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C., § 9613(g)(3)(B)?

## STATEMENT UNDER RULE 29.1

In accordance with Rule 29.1 of the Rules of this Court, respondent Carleton Woolen Mills, Inc. states that it is a wholly-owned subsidiary of Allied Textile Companies, Public Limited Company, a United Kingdom company with shares traded on the London Stock Exchange. No subsidiary of Carleton Woolen Mills, Inc. has issued shares to the public.

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## BRIEF IN OPPOSITION OF RESPONDENT CARLETON WOOLEN MILLS, INC.

Respondent Carleton Woolen Mills, Inc. ("Carleton") joins in the Brief in Opposition submitted by Respondent Browning-Ferris Industries, Inc. The purpose of Carleton's Brief in Opposition is to address, pursuant to Rule 15 of this Court, specific perceived misstatements or omissions of fact and law in the Petition for a Writ of Certiorari (the "Petition")

and to submit certain supportive reasons for denying the Petition.

## COUNTERSTATEMENT OF THE CASE

Carleton adopts the Counterstatement of the Case contained in the Brief in Opposition submitted by Browning-Ferris Industries, Inc., as supplemented below.

### I. CORRECTION OF PERCEIVED MIS-STATEMENTS IN PETITIONERS' STATEMENT OF THE CASE

Under the heading "Factual Background" on pages 2 and 3 of their Statement of the Case, Petitioners omit several significant facts unfavorable to their later arguments:

A. Petitioners do not explain why they did not seek to have any of the Respondents designated as PRPs by the EPA during the period 1981 to March 1986 and took no action to seek a sharing or reimbursement of costs from the Respondents thereafter within the time allowed by CERCLA Section 113(g)(3). 42 U.S.C. § 9613(g)(3).

B. Petitioners fail to advise the Court that Inmont Corporation ("Inmont"), Petitioners' predecessor, did not enter into a voluntary settlement agreement or administrative consent decree, both of which were enforcement devices commonly used by the EPA during the period from 1981 to 1986, but waited over four years to resolve its liability by a judicial consent decree (the "Consent Decree") in a civil action in the

U.S. District, Court, District of Maine, in March 1986. JA, A-45.[1]

C. Petitioners do not state that the Consent Decree contained favorable terms negotiated by Inmont including provisions that it would be required to install a groundwater interceptor system and a groundwater treatment system only if an alternate concentration limit ("ACL") should be exceeded as established based on an ACL Demonstration to be made by Inmont within 365 days from the effective date of the Consent Decree. JA, A-85 and 105. This provision for an ACL Demonstration was negotiated before the adoption of § 121(d)(2)(ii) of CERCLA, 42 U.S.C. § 9621(d)(2)(ii), in October 1986 expressly authorizing ACLs as an alternative to treatment of contaminated groundwater to meet "background" levels or federal drinking water standards. Thus, Inmont negotiated a favorable arrangement in the Consent Decree, i.e., an opportunity to avoid costly interception and treatment of groundwater which was the EPA's usual remedy.

D. Petitioners suggest that they are fulfilling Inmont's obligations under the Consent Decree (Petition at 3). Petitioners do not disclose that they did not submit the ACL Demonstration within 365 days and, indeed, did not submit it until September, 1992. *See* Brief of Plaintiff-Appellants dated December 29, 1993 filed by Petitioners on appeal to the U.S. Court of Appeals for the First Circuit, page 11.

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[1] "JA" refers to the parties' Joint Appendix in the Court of Appeals, a copy of which is lodged with the Clerk of this Court.

E. Petitioners volunteer that remedial cost is expected eventually to total between thirty and forty million dollars (Petition at 3), but provide no basis for such estimate. They do not disclose how much of the cost resulted from the long delay in submission of the ACL Demonstration or why the ACL Demonstration failed after such a long time to persuade the EPA to excuse Petitioners from groundwater interception and treatment. Further, they offer no estimate of how much of the future cost is attributable to continuing dispersion of contamination throughout the soil and groundwater at the Winthrop Landfill during the years after 1981 when Inmont was first designated a PRP.

F. Petitioners do not disclose how their remedial actions at the Winthrop Landfill, including the installation of a landfill cap (JA, A-90 to A-96), may have commingled or eliminated evidence of contamination by Inmont and others, thus making it difficult and perhaps impossible to determine responsibility therefor.

## II. CORRECTION OF PERCEIVED MISSTATEMENTS IN PETITIONERS' REASONS FOR GRANTING THE PETITION

Throughout their Reasons for Granting the Petition (Petition at 9 to 20), Petitioners seek repeatedly to enlist the sympathy of the Court by arguments based on erroneous facts and assumptions. They portray Inmont, themselves and other PRPs considering a consent decree to remediate hazardous waste facilities as needing powerful cost recovery incentives to cause them to undertake a cleanup, as though the decision were somehow voluntary.

Petitioners do not point out that Section 109 of CERCLA, 42 U.S.C. § 9609, contains civil penalty provisions which are powerful incentives. They do not state that court decisions imposing liability and penalties on stockholders, directors, officers, managers and successors have received wide publicity and are also powerful incentives. They do not state that, in the instant case, Inmont had the incentive of a favorable decree allowing it to present an ACL Demonstration so as to avoid pumping and treating the millions of gallons of hazardous substances for which it was designated as the sole generator PRP. *See* Consent Decree, JA, A-85 and A-105.

Petitioners argue that the decision of the Court of Appeals deprives PRPs seeking to recover response costs of the remedy of joint and several liability free of equitable and causation-related defenses (Petition at 19). These issues are not before the Court. However, in their argument, Petitioners are silent on the potential for PRPs performing cleanups to engage in conduct which could give them an unfair advantage in a long-belated allocation through removal or treatment of waste and alterations of a facility during remediation. Unjustified efforts by persons performing cleanups to shift their costs are well known. *See, e.g., B.F. Goodrich Co. v. Murtha*, 815 F. Supp. 539 (D. Conn. 1993); *later proceedings in the same case*, 840 F. Supp. 180 (D. Conn. 1994).

Petitioners' discussion of bills considered, but not adopted, during 1994 by Congress (Petition at pages 15 and 16) is deficient for two reasons. First, Petitioners fail to inform the Court that the bills, S. 1834, contained in S. Rep. No. 349, 103d Cong., 2d Sess. (1994), and H.R. 3800, contained in H.R. Rep. No. 582, 103d Cong., 2d Sess. (1994), if adopted, would have created fundamentally new methods for the identification of PRPs and the allocation of liability among them. Under the bills, the EPA would have identified PRPs found through its own investigation and through

information submitted by other persons including PRPs. After notice and other specified procedures, the EPA would then have issued a list of parties subject to the new allocation process. A new § 130(p)(3) of CERCLA would then have prohibited any action under § 107 or otherwise to seek contribution against any person not listed as an allocation party. S. Rep. No. 349 at 287 and H.R. Rep. No. 582 at 318. The bills would also have authorized the EPA to assign zero allocation shares, if appropriate, and to make *de minimis* settlements with allocation parties that would have barred contribution rights against them. Thus, the bills would have protected persons, such as the Respondents, who were not named as PRPs by the EPA, from long-belated lawsuits such as the instant case.[2]

Second, contrary to Petitioners' description, the proposed provisions of the bills changing the statute of limitations were indeed controversial once members of the Senate Committee on Environment and Public Works and other Senators and Representatives learned about them. During the drafting of the bills, S. 1834 and H.R. 3800, counsel for Petitioners served as counsel for an industry coalition which worked with other groups to propose the amendments. The proposed change of the statute of limitations was accomplished by an obscurely worded amendment that would have added a six-year period to the present three-year period by a cross-reference in § 113(g)(2)(C)(i) to § 113(g)(2)(A). S. Rep. No. 349 at 204, and H.R. Rep. No. 582 at 256. The change was described in the committee reports as a mere clarification with nothing to alert committee members of existing and pending litigation.

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[2] The bills would also have provided for funding of "orphan shares" up to $300 million per year from a trust fund to be created and maintained by excise taxes.

In September, 1994, several Senators and Representatives, including some who were serving as members of committees handling the bills, learned the significance of the change and took steps to implement corrective action. Because the final days of the Congressional term had been reached, the deadline set by the House Rules Committee for changes in H.R. 3800 passed before the Representatives could propose a change. However, Senator George Mitchell, a member of the Senate Committee on the Environment and Public Works, proposed a manager's amendment including, among other things, an amendment to § 113(g)(2) of S. 1834 providing that the change of the statute of limitations would apply after the date of enactment of the Superfund Reform Act of 1994. *See* 8 *Inside EPA's Superfund Report* 3, 34-38 (September 21, 1994). Thus, the amendment of the statute of limitations in S.1834 would not have applied to existing cases. Subsequently, neither S.1834 nor H.R. 3800 were sent to the floors of the Senate and House for adoption.

As described earlier, the new PRP identification and liability allocation methods in the bills made academic any useful function for a longer statute of limitations except to create an argument for Petitioners in the instant case.

## REASONS FOR DENYING THE WRIT

Rule 14.1 of this Court requires that the questions presented in a petition for a writ of certiorari be short and concise and not argumentative. Petitioners' statement of the questions presented skews them in a manner which is highly argumentative.

Rule 10 of this Court sets forth examples of reasons that will be considered in determining whether to exercise its discretion to grant a writ of certiorari, none of which are present in the instant case:

(1) The decision of the Court of Appeals is not in conflict with any decision of this Court. Indeed, the Court of Appeals found in its opinion (page 16a, note 12) that its decision was consistent with this Court's decision in *Key Tronic Corp. v. United States*, 114 S. Ct. 1960 (1994). Once Petitioners' claim to recover response costs is determined to be for contribution, it is controlled by the language of 42 U.S.C. § 9613(g)(3) which clearly provides that no action for contribution for any response costs or damages may be commenced more than 3 years after the date of entry of a judicially approved settlement in any action under CERCLA for recovery of such costs or damages.

(2) There is no conflict among the United States courts of appeals. Indeed, the recent decision in *United States v. Colorado & Eastern Railroad Co.*, Nos. 93-1422, 94-1041, 1994 WESTLAW 647329 (10th Cir. Nov. 11, 1994)[3] is consistent with the decision of the Court of Appeals in the instant case insofar as it held that actions by PRPs to recover response costs from other PRPs are, regardless of the label used, actions for contribution. The other decisions by the United States courts of appeals cited by Petitioners did not consider and decide the issues presented in the instant case.

The decision of the Court of Appeals enhances the goals of CERCLA to encourage prompt and effective cleanups by requiring that contribution actions be commenced in a timely

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[3] LEXIS reports that the Court of Appeals withdrew its opinion on January 11, 1995.

manner. Thus, to the extent that such claims may be meritorious, the response costs recovered will become available at an earlier date to relieve the financial burdens of cleanups.

## CONCLUSION

For the reasons stated in the Brief in Response of Browning-Ferris Industries, Inc. and herein, the Petition should be denied.

Respectfully submitted,

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January 19, 1995